Supreme Court, U.S.
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No. 04-143

In The Supreme Court of the United States

ROBERT W. BERRY; DIANE L. SPENCER,

Petitioners,

v.

MERRILL LYNCH, PIERCE, FENNER and SMITH INCORPORATED,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court should decline to review an unpublished decision of the court of appeals denying equitable tolling of the three-month time limitation in the Federal Arbitration Act for serving a motion to vacate where there is no circuit conflict and the court below held that the case did not merit equitable tolling because petitioners had not acted diligently to protect their rights?

CORPORATE DISCLOSURE STATEMENT

Respondent, Merrill Lynch, Pierce, Fenner & Smith Incorporated, is a wholly-owned subsidiary of Merrill Lynch & Co., a publicly traded company.

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COUNTER-STATEMENT OF THE CASE

Petitioners are former Financial Advisors with Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch") who resigned to work for a competitor firm and violated their restrictive covenant agreements not to solicit Merrill Lynch clients. Merrill Lynch sought and obtained injunctive relief against them in the United States District Court for the Northern District of Ohio, and the matter then proceeded to mandatory arbitration before the National Association of Securities Dealers ("NASD"). On March 4, 2002, after seven days of hearings before an NASD panel of arbitrators, the panel ruled in favor of Merrill Lynch on its injunctive and damages claims against petitioners and in favor of petitioner Robert Berry on one of his counterclaims. Petitioners' App. 17a.

Thereafter, on October 2, 2002, almost seven months later, petitioners filed in the district court a motion to vacate the arbitration award, asserting "evident partiality" under Section 10 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 10, on the part of one of the arbitrators. Petitioners' App. 44a. The district court denied the motion because it was filed well past the three-month period set out in Section 12 of the FAA, 9 U.S.C. § 12, and denied petitioners' request for equitable tolling of the three-month time limitation. Petitioners App.12a

On appeal to the United States Court of Appeals for the Sixth Circuit, petitioners contended that their delay in filing the motion to vacate should be excused under the doctrine of equitable tolling. While petitioners pointed to nothing in the arbitration record demonstrating "evident partiality" by the arbitrator in question, they insisted that two "facts" not disclosed by him in the NASD prehearing

disclosure forms showed that he was, in fact, biased either against petitioners, or their counsel.

Petitioners alleged that the arbitrator failed to disclose that (1) he once had been adverse as a party to petitioner's counsel in a municipal court proceeding; and (2) he had been named in a charge of discrimination involving a worker's compensation claimant while he was employed as an in-house lawyer for a local bank several years earlier. From these facts, petitioners fashioned the argument that the arbitrator was hostile both to petitioners' counsel and to at least some of petitioners' counterclaims of employment discrimination.

In a *per curiam* opinion, the court of appeals dismissed petitioners' allegations of arbitrator bias, calling them "slight and speculative" and noted that the arbitrator was not charged with colluding with the parties. Petitioners' App. 10a. Holding that petitioners were not entitled to invoke the equitable tolling doctrine, the court of appeals stressed that petitioners had not acted diligently in the matter:

- "This court will not encourage strategic negligence by arbitrants"
- "Defendants clearly failed to research [arbitrator] Zeiser diligently in general, and so did not come to this equitable table with clean hands" and
- "[t]he statutory period cannot be equitably tolled, because [defendants] failed to safeguard their rights diligently." *Id.* at 9a-10a.

A concurring judge opined that, while there may be instances where the three-month period of Section 12

should be equitably tolled, "[d]efendants have failed to make out a case for equitable tolling." *Id.* at 11a.

Petitioners do not challenge the court of appeals' conclusion about their lack of diligence or their lack of entitlement to equitable tolling. Rather, they sprinkle the petition with various quotations from other courts of appeals as to whether equitable tolling generally is available under the FAA, and then maintain that "this mix of authority leaves a great deal of uncertainty in the lower courts as to whether equitable tolling may be raised with regard to the three month time limitation in 9 U.S.C. § 12 . . . and this Court should decide this issue once and for all . . . " Petition at 10.

REASONS FOR DENYING THE WRIT

A. There is No Split Among the Circuits.

This is a garden-variety equitable tolling case. There is no circuit conflict. No reported district court or court of appeals decision ever has held equitable tolling applicable to the filing of a motion to vacate under the FAA, and this Court previously has declined to address the issue. *See, e.g., Cullen v. Paine, Webber, Jackson & Curtis, Inc.*, 863 F.2d 851, 854 (11th Cir.) (rejecting appellant's argument for a judicially-created due diligence exception to three-month period of Section 12), *cert. denied*, 490 U.S. 1107 (1989) Thus, contrary to the hyperbole of the petition, there is no uncertainty in the lower courts as to whether equitable tolling applies to such motions, and the petition represents nothing more than an ill-considered request for an advisory opinion.

The FAA, 9 U.S.C. § 1 et seq., provides "the exclusive remedy for challenging acts that taint an arbitration award" issued following arbitration conducted under a valid agreement to arbitrate. Section 12 of the FAA provides that "[n]otice of a motion to vacate, modify or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered." 9 U.S.C. § 12.

In addressing motions to vacate arbitration awards, the lower courts consistently have emphasized the need for speed and finality of arbitral decisions. *See, e.g.*, *Fradella v. Petricca*, 183 F.3d 17 (1st Cir. 1999) (court did not address whether there could be equitable tolling because appellant did not establish that he was misled by NASD or by appellee); *Lander Co. v. MMP Investments, Inc.*, 107 F.3d 476, 478 (7th Cir.), *cert. denied*, 522 U.S. 811 (1997); *Professional Administrators Ltd v. Kopper-Glo Fuel, Inc.*, 819 F.2d 639, 642 (6th Cir. 1987) ("if a defendant has important defenses to an arbitration award he should raise them within the period prescribed for actions to vacate"); *Taylor v. Nelson*, 788 F.2d 220, 225 (4th Cir. 1986) (court need not consider equitable tolling because appellant had not shown he was prevented from filing during the three-month period of Section 12); *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 177 (2d Cir. 1984) (party may not move to vacate after three months because arbitration's role as "mechanism for speedy dispute resolution disfavors delayed challenges to validity of an award"); *Piccolo v. Dain Kalman & Quail*, 641 F.2d 598, 600 (8th Cir. 1981) ("party to an arbitration award who fails to comply with the statutory precondition of timely service of notice forfeits the right to judicial review of the award"); *Hobet Mining Inc. v. United Mine Workers*, 877 F. Supp.

1011, 1017-18 (S.D.W.Va. 1994) ("section 12 neither expressly nor implicitly ... allows of any exceptions"); *Pennsylvania Engineering Corp. v. Islip Resource Recovery Agency*, 714 F. Supp. 634, 638 (E.D.N.Y. 1989) ("no common law exceptions to FAA to allow for equitable tolling").

While identifying the concerns for speed and finality of arbitral decisions, the court of appeals here recognized that the pro-arbitration policies of the FAA should not be used to justify a fundamentally unfair process, citing this Court's decision in *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987) (arbitration decision procured by party through fraud or arbitrator's dishonesty not enforceable). Petitioner's App. at 8a-9a. The court of appeals, however, did not reach a decision as to whether or under what circumstances equitable tolling of the limitations period for a motion to vacate would be justified because it found insufficient diligence by petitioners to invoke the doctrine's protection in any event. *Id.*[1]

[1] In *Andrews v. Orr*, 851 F.2d 146, 151 (6th Cir. 1988), the Sixth Circuit set out the following factors generally considered in applying the equitable tolling doctrine: (1) lack of actual notice of filing requirement; (2) lack of constructive knowledge of filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the defendant; and (5) a plaintiff's reasonableness in remaining ignorant of the notice requirement. The court of appeals held that a party's lack of diligence could be dispositive, citing *Irwin v. Dept. of Veteran's Affairs*, 498 U.S. 89, 96 (1990). Petitioners' App. at 9a.

B. The Sixth Circuit Held That the Facts of This Case Did Not Merit Equitable Tolling

The court of appeals determined that it did not need to reach a decision on whether the equitable tolling doctrine ever could be applied to a motion to vacate an arbitration award because it found that petitioners did not act with the diligence necessary to invoke such an extraordinary remedy. Indeed their petition does not even dispute that conclusion.

The court of appeals' thoughtful discussion of the FAA's balancing of speed and finality considerations on the one hand, and arbitral fairness on the other hand, does not demonstrate a circuit conflict, but rather is *dictum* that, under the right circumstances, it might consider equitable tolling. The court of appeals concluded, however, that this is not the appropriate case for it because petitioners failed to act diligently in discovering the facts underlying their motion.

As the Court explained in *Irwin v. Department of Veteran Affairs*, 498 U.S. 89, 96 (1990), equitable tolling has been permitted where "the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence."

The court of appeals' conclusions about the lack of diligence are unassailable. Petitioners' counsel easily could have acquired information about the arbitrator in question

in advance of the arbitration but failed to do so.[2] Given the "slight and speculative" nature of the petitioners' nondisclosure arguments concerning the arbitrator, petitioners' failure to raise these issues prior to, or at the arbitration hearing, must be deemed to be "strategic negligence."[3]

Under these circumstances, *i.e.*, where the court of appeals found that the case did not merit equitable tolling in any event, the first and second questions presented in the petition are nothing more than requests for an advisory opinion. The Court exercises its power "to correct wrong judgments, not revise opinions. If the same judgment would be entered by the [lower] court after we corrected its views of federal laws, our review would amount to nothing more than an advisory opinion." *Herb v.*

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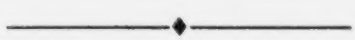
[2] NASD arbitration rules expressly allow for the striking of an arbitrator for cause. NASD Uniform Code of Arbitration, Rule 10311 ("There shall be unlimited challenges for cause"). Had petitioners acted with due diligence, and had they truly believed that the arbitrator would be biased unfavorably from prior dealings, they could have struck him. The arbitration panel was appointed in June 2001 and hearings did not occur until January 2002.

[3] In prior decisions, the Sixth Circuit has held that "to invalidate an arbitration award on grounds of bias [or evident partiality], the challenging party must show that 'a reasonable person would have to conclude that an arbitrator was partial' to the other party to the arbitration." *Apperson v. Fleet Carrier Corporation*, 879 F.2d 1344, 1358 (6th Cir. 1989), *cert. denied*, 495 U.S. 947 (1990); *Dawahare v. Spencer*, 210 F.3d 666, 669 (6th Cir.), *cert. denied*, 531 U.S. 878 (2000). The "alleged partiality must be direct, definite, and capable of demonstration, and the party asserting evident partiality must establish specific facts that indicate improper motives on the part of the arbitrator." *Nationwide Mutual Insurance Co. v. The Home Insurance Co.*, 278 F.3d 621, 626 (6th Cir. 2002) (quoting *Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 329 (6th Cir. 1998)). Because of the untimeliness of the motion to vacate, the court of appeals did not reach the merits of petitioners' claims.

Pitcairn, 324 U.S. 117, 125-26 (1945). The constitutional and prudential limitations on the exercise of the Court's jurisdiction ensure that cases will present concrete facts of record, not abstract or conjectural ones. The petition should therefore be denied because it essentially seeks an advisory opinion that would not change the underlying result of the court of appeals' decision.

C. Discovery Was Not Necessary Because the Case Did Not Merit Equitable Tolling

The third question presented in the certiorari petition – whether discovery should be required in a case asserting misconduct or conflict of interest by an arbitrator – likewise does not require review by the Court for the same reasons. Petitioners' attempt to show a circuit conflict by contrasting the court of appeals' decision below with a decision from the Eleventh Circuit in *University Commons-Urbana Ltd. v. Universal Constructors*, 304 F.3d 1331 (11th Cir. 2002), is completely unpersuasive. In *University Commons*, the Eleventh Circuit remanded for discovery on the extent of an alleged current conflict between the arbitrator and a party. *University Commons* did not involve equitable tolling because the motion to vacate was served on a timely basis. The *University Commons* decision merely states the proposition that, under appropriate circumstances, a party can seek discovery to establish issues raised in a motion to vacate. Nothing suggests that the Sixth Circuit and Eleventh Circuit are in fundamental disagreement about this issue, that there otherwise exists a circuit conflict, or that such an issue involving a discovery dispute warrants the attention of the Court.



CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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